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No. 99-1418

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

RICHARD TER MAAT,

Petitioner,

v.

BROWNING-FERRIS INDUSTRIES OF ILLINOIS, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a corporate officer may be held individually liable as a facility "operator" under § 107(a)(2) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9607(a)(2), where the officer's personal conduct satisfies the standard for "operator" liability established in *United States v. Bestfoods*, 524 U.S. 51 (1998).

RULE 29.6 STATEMENT

Respondent Browning-Ferris Industries of Illinois, Inc. is a wholly owned subsidiary of Browning-Ferris Industries, Inc., which is in turn a wholly owned subsidiary of Allied Waste North America, Inc. Allied Waste North America, Inc. is a wholly owned subsidiary of Allied Waste Industries, Inc., which is a publicly held company. Other than Allied Waste Industries' indirect ownership, no publicly held company owns 10% or more of Browning-Ferris Industries of Illinois, Inc.'s stock.

The parent company of Respondent Apache Products Company is Jasper Corporation. No publicly held company owns 10% or more of Apache Products Company's stock.

Respondent Tamms Industries has no parent corporation. No publicly held company owns 10% or more of Tamms Industries' stock.

The parent company of Respondent DaimlerChrysler Corporation is DaimlerChrysler AG, which is a publicly held company. Other than DaimlerChrysler AG, no publicly held company owns 10% or more of DaimlerChrysler Corporation's stock.

The parent company of Respondent The Ingersoll Milling Machine Company is Ingersoll International, Inc. No publicly held company owns 10% or more of The Ingersoll Milling Machine Company's stock.

RULE 29.6 STATEMENT – Continued

The parent corporation of Respondent Newell Operating Company is Newell Co., which is a publicly held company. Other than Newell Co., no publicly held company owns 10% or more of Newell Operating Company's stock.

The parent corporation of Respondent Camcar Division of Textron Inc. is Textron, Inc., which is a publicly held company. Other than Textron, Inc., no publicly held company owns 10% or more of Camcar Division of Textron Inc.'s stock.

Respondent Twin Disc, Inc. has no parent corporation. No publicly held company owns 10% or more of Twin Disc, Inc.'s stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

STATEMENT 1

REASONS FOR DENYING THE WRIT 6

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Acushnet Co. v. Mohasco Corp., 191 F.3d 69 (1st Cir. 1999) 12

American Construc. Co. v. Jacksonville, T. & K.W. Ry., 148 U.S. 372 (1893) 10

Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R., 389 U.S. 327 (1967) 9-10

Canadyne-Ga. Corp. v. NationsBank, N.A. (South), 183 F.3d 1269 (11th Cir. 1999) 12

Carter-Jones Lumber Co. v. Dixie Distributing Co., 166 F.3d 840 (6th Cir. 1999) 8

Deby, Inc. v. Cooper Indus., No. 99 C 2464, 2000 WL 263985 (N.D. Ill. Feb. 29, 2000) 9

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 10

Mannion v. Stallings & Co., 204 Ill. App.3d 179, 561 N.E.2d 1134 (1st Dist. 1990) 13

Mazurek v. Armstrong, 520 U.S. 968 (1997) 10

Norfolk So. Ry. Co. v. Gee, No. 98 C 1619, 1999 WL 286287 (N.D. Ill. April 23, 1999) 9

People ex rel. Burris v. C.J.R. Processing, Inc., 269 Ill. App.3d 1018, 647 N.E.2d 1035 (3d Dist. 1995) 13

Public Serv. Co. of Colo. v. Gates Rubber Co., 175 F.3d 1177 (10th Cir. 1999) 12

TABLE OF AUTHORITIES – Continued

Page

Riverside Mkt. Dev. Corp. v. International Bldg. Prods., Inc., 931 F.2d 327 (5th Cir.), *cert. denied*, 502 U.S. 1005 (1991) 5, 7

Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417 (7th Cir. 1994) 4, 5, 7

United States v. Bestfoods, 524 U.S. 51 (1998) ..... *passim*

United States v. Green, 33 F. Supp.2d 203 (W.D.N.Y. 1998) 9

United States v. Township of Brighton, 153 F.3d 307 (6th Cir. 1998) 8, 11

Washington Courte Condo. Ass'n v. Washington-Golf Corp., 267 Ill. App.3d 790, 643 N.E.2d 199 (1st Dist. 1994) 13

STATUTES

Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*

§ 107(a)(1), 42 U.S.C. § 9607(a)(1) 8

§ 107(a)(2), 42 U.S.C. § 9607(a)(2) i

§ 113, 42 U.S.C. § 9613 1

STATEMENT

This is an action for contribution under § 113 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9613. Respondents, plaintiffs below, are eight companies who responded to notices of potential CERCLA liability from the United States Environmental Protection Agency ("EPA") by agreeing to clean up the M.I.G./DeWane Superfund Site near Belvidere, Illinois. Respondents seek to recover a portion of the cleanup costs they have incurred from Petitioner Richard Ter Maat, as well as from two corporations of which Petitioner was the President and primary shareholder, M.I.G. Investments, Inc., and AAA Disposal Systems, Inc., all of which responded to EPA's notice of potential liability by doing nothing. Pet. App. 2a.[1]

Mr. Ter Maat and his corporations operated the Site for 13 years, from 1975 to 1988. Pet. App. 2a. The operating permit for the Site was held by M.I.G., a corporation Mr. Ter Maat, his father, and a third individual incorporated "for the sole purpose of operating the landfill." Pet. 4. As the Petition candidly acknowledges, "MIG was technically insolvent" throughout its life, because M.I.G. was managed "so that the profits of the business were routed through AAA," M.I.G.'s sister company. Pet. 6. Not surprisingly, when the Site was ordered to close in

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[1] Although the Petition is purportedly filed on behalf of Mr. Ter Maat *and his corporations*, Pet. ii, the personal liability issue presented by the Petition relates solely to Mr. Ter Maat. Respondents accordingly refer to Mr. Ter Maat as the sole Petitioner throughout this brief.

1988, M.I.G. had no funds to properly shut it down, so "the landfill was abandoned and [M.I.G.] was dissolved." *Id.* In 1990 EPA placed the Site on the National Priorities List of the Nation's hazardous waste sites most urgently requiring cleanup. Pet. App. 2a.

The contribution case was tried without a jury over two weeks in January 1998. The parties stipulated the M.I.G. was liable as an "operator". Pet. App. 25a n.9. At trial, Respondents presented evidence that Mr. Ter Maat personally: negotiated virtually every contract allowing waste haulers to dump at the Site; participated in the decision whether to accept particular wastes for disposal at the Site; supervised equipment operators in the physical operations at the Site; and participated in the process for obtaining regulatory approval to dump "special wastes" at the Site, and signed every "special waste" permit application. Trial Transcript ("Tr.") 487-88, 501-02, 537, 591-92, 1929-38, 2008-09, 2026-27, 2036, 2040-41; Ter Maat Deposition 122, 128, 483-84, 1655, 1848-49.[2] Further, the evidence at trial showed that Mr. Ter Maat was the primary contact for, and negotiator with, state and municipal agencies concerning environmental issues at the Site, to the point of insisting that he be physically present for each and every Site inspection. Tr. 478-79, 593, 1926, 1932-34, 1962-67, 1972-77, 2095; Exhibits P275, P276, P277, P278, P281. Mr. Ter Maat also personally negotiated all arrangements between M.I.G., which leased the Site

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[2] The District Court admitted Mr. Ter Maat's deposition into evidence. Pet. App. 53a. However, because the deposition was not read into the record, it is not included in the trial transcript.

property, and the property's owners, as well as all contracts with vendors relating to landfill gas management, landfill expansion, and management of landfill access roads. Tr. 53, 65-68, 478, 593, 1881, 1893, 1949-50, 2058-59; Ter Maat Deposition 403, 416-17.

The District Court issued its Memorandum Opinion and Order on July 29, 1998. Pet. App. 20a. With regard to the "operator" liability of M.I.G.'s sister corporation, AAA, the District Court recognized that, under *United States v. Bestfoods*, 524 U.S. 51 (1998), AAA could be held liable as an "operator" if it had "direct[ed] the workings of, manage[d], or conduct[ed] the affairs of [the] site." Pet. App. 26a. The District Court found that this standard had been satisfied and that AAA was properly held liable, based solely on actions taken personally by Mr. Ter Maat in his capacity as AAA's President. Pet. App. 28a-29a.

The District Court found, in discussing *AAA's* "operator" liability, that "Richard Ter Maat, as an officer and director of AAA and MIG, was involved in the operational decision-making at the site." Pet. App. 28a. However, although it had found that *Bestfoods* called for an "actual participation" standard and justified *AAA's* liability, the District Court found that *Bestfoods* required the opposite result with respect to Mr. Ter Maat: according to the District Court, Petitioner could *only* be held liable as an "operator" based on his actions as a corporate officer if piercing the corporate veil under state law was warranted.

> While the *Bestfoods* decision offers significant guidance on the meaning of an operator for purposes of direct liability under CERCLA, the

> Court was careful to point out that CERCLA does not impinge on established corporate principles under state law. Prior to *Bestfoods*, however, the Seventh Circuit held that a corporate officer could be held directly liable as an operator under CERCLA irrespective of state veil-piercing law. *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420-21 (7th Cir. 1994). The court respectfully believes that the *Bestfoods* case directly applies to, and therefore trumps, the *Sidney S. Arst* decision. Consequently, the only way plaintiffs can attribute individual liability as an operator to Richard Ter Maat, as an officer of both MIG and AAA, is derivatively under state veil-piercing law.

Pet. App. 30a (citation omitted).

Respondents appealed, and the Seventh Circuit reversed the District Court's judgment to the extent it absolved Petitioner of personal liability for his own actions. Pet. App. 4a-6a. In an opinion by Chief Judge Posner, the court characterized the issue of Mr. Ter Maat's personal liability as "relatively simple." Pet. App. 4a.

> [The question] is whether an individual can shield himself from liability for operating a hazardous-waste facility merely by being an officer or shareholder of a corporation that also operates the facility. The answer is no. The principle of limited liability shields a shareholder from liability for the [corporation's] debts * * * , but not for his personal debts, including debts arising from torts that he commits himself. In other words, the status of being a shareholder does not immunize a person for liability for his, as distinct from the corporation's, acts. There is no liability shield at all for an officer. If he commits

> an act that is outside the scope of his official duties, his employer may not be liable; but he is whether or not the act was within that scope. Which is not to say, however, that the officer is automatically liable for the acts of the corporation; there is no doctrine of "superiors' liability," comparable to the doctrine of respondeat superior * * * .
>
> So if Ter Maat operated the landfill personally, rather than merely directing the business of the corporations of which he was president * * * , he is personally liable. E.g., *United States v. Bestfoods*, 524 U.S. 51, 55 (1998); *Sidney S. Arst Co. v. Pipefitters Welfare Education Fund, supra*, 25 F.3d at 421-22; *Riverside Market Development Corp. v. International Bldg. Products, Inc.*, 931 F.2d 327, 330 (5th Cir. 1991) (per curiam). * * * If Ter Maat did not merely direct the general operations of M.I.G. and AAA, or specific operations unrelated to pollution, but supervised the day-to-day operations of the landfill – for example, negotiating waste dumping contracts with the owners of the wastes or directing whether the wastes were to be dumped or designing or directing measures for preventing toxic substances in the wastes from leaching into the ground and thence into the groundwater – then he could be deemed the operator, jointly with his companies, of the site itself.

Pet. App. 4a-5a (other citations omitted).

While the Seventh Circuit rejected the District Court's conclusion that Mr. Ter Maat could not be held liable for his own actions, because the District Court had not made full findings regarding the nature of Mr. Ter Maat's personal involvement in the Landfill's operation,

the court concluded that "a remand is necessary to determine Ter Maat's status." Pet. App. 6a.

REASONS FOR DENYING THE WRIT

1. The Petition suffers from an obvious and fatal flaw: As Petitioner himself concedes, "[t]his case presents the same issue" this Court unanimously decided less than two years ago in *United States v. Bestfoods*, 524 U.S. 51 (1998). Pet. 17-18.

In *Bestfoods*, this Court held that a parent corporation could be held directly liable as an "operator" of a facility owned by its subsidiary, where the parent corporation actively and directly participated in the operation of the facility. *Bestfoods* explains that any "person" who actively participates in the waste disposal process at a facility may be liable as an "operator":

> [U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

Id. at 66-67.

This Court clearly recognized that *Bestfoods'* reading of CERCLA's "operator" definition would govern the liability of corporate officers, since the decision cites with

approval two Court of Appeals decisions which applied a similar "active participation" standard to corporate officers. *See* 524 U.S. at 65 (citing *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417 (7th Cir. 1994) and *Riverside Mkt. Dev. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327 (5th Cir.), *cert. denied*, 502 U.S. 1004 (1991)).

In light of *Bestfoods*, the court below aptly characterized the issue of Petitioner's personal liability as "relatively simple." Pet. App. 4a. Following *Bestfoods'* lead, Chief Judge Posner explained that Mr. Ter Maat could be held personally liable if his own conduct satisfied the "active participation" standard: "If Ter Maat * * * supervised the day-to-day operations of the landfill * * * then he could be deemed the operator, jointly with his companies, of the site itself." Pet. App. 5a.

Because the decision below represents nothing more than a straightforward application of *Bestfoods*, certiorari is unwarranted.

2. Petitioner argues that certiorari should be granted because of a purported conflict between circuit decisions, some adopting an "authority to control" standard, and others an "actual control" test. Pet. 7-12. But all of the cases Petitioner cites as evidence of this conflict pre-date *Bestfoods*. This Court granted certiorari in *Bestfoods* specifically to resolve the conflict between the "authority to control" and "actual control" standards. 524 U.S. at 60-61 n.8 (citing conflicting circuit decisions). And *Bestfoods* settled the issue – as the Sixth Circuit recently held, *Bestfoods* rejected the "authority to control" standard (under which a corporate actor could be held liable based solely on his position in the corporate hierarchy),

in favor of an "actual control" standard emphasizing a person's affirmative actions managing the facility. *United States v. Township of Brighton*, 153 F.3d 307, 314 (6th Cir. 1998) (under *Bestfoods*, "[t]he failure to act, even when coupled with the ability or authority to do so, cannot make an entity into an operator"); *see also id.* at 325 (concurring opinion).[3]

Petitioner is truly "fighting the last war" – he argues that certiorari is warranted based on a circuit conflict this Court recognized, and resolved, just two Terms ago. Petitioner's citation to conflicting pre-*Bestfoods* cases does not justify this Court's revisiting an issue it so recently decided.

3. In contrast to the pre-*Bestfoods* caselaw Petitioner cites, decisions addressing the CERCLA liability of corporate officers after *Bestfoods* uniformly apply an "actual control" or "active participation" standard functionally identical to the standard applied by the court below. Thus, the Sixth Circuit has held that *Bestfoods* requires that "an officer be actively involved in the arrangements for disposal" to be liable as an "arranger" under CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1). *Carter-Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840, 846-47 (6th Cir. 1999) (a corporate officer "may not hide behind his officer or employee status in [a corporation] to claim that because he took all actions on behalf of the company he cannot be

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[3] While *Township of Brighton* spawned three opinions, the panelists disagreed only over the standards under which a *governmental agency* could be deemed an "operator", 153 F.3d at 313-16, 323-28, 333-35; all of the judges agreed that *Bestfoods* resolved the "authority to control"/"actual control" debate.

personally liable"); *see also, Deby, Inc. v. Cooper Indus.*, No. 99 C 2464, 2000 WL 263985, at *5 (N.D. Ill. Feb. 29, 2000) (applying *Bestfoods'* standard for "operator" liability to a corporate officer); *Norfolk So. Ry. Co. v. Gee*, No. 98 C 1619, 1999 WL 286287, at *2-*3 (N.D. Ill. April 23, 1999) (same); *see also, United States v. Green*, 33 F. Supp.2d 203, 217 (W.D.N.Y. 1998) (under *Bestfoods*, individual shareholder may be held directly liable as an "operator" if "'he directly participated in the management of the facility's pollution control operations including decisions pertaining to the disposal of hazardous substances and compliance with environmental regulations").

Decisions subsequent to *Bestfoods*, including the decision below, speak with one voice – a corporate officer may be held individually liable as a CERCLA "operator" if he directly participates in a facility's wasfe-related operations. Unless and until a post-*Bestfoods* conflict develops, intervention by this Court is unnecessary.

4. Putting aside the lack of a present circuit conflict, a further consideration justifies denial. The decision below does not decide Mr. Ter Maat's personal liability as a CERCLA "operator"; instead, it remands the case to the District Court for additional factual findings. Pet. App. 6a.[4]

This Court ordinarily does not grant certiorari to review interlocutory decisions. *See, e.g., Brotherhood of*

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[4] In conferences among counsel ordered by the District Court, Petitioner's counsel has gone even further, and argued that *further evidentiary hearings* are necessary before Mr. Ter Maat's personal liability can be decided on remand.

Locomotive Firemen v. Bangor & Aroostock R.R., 389 U.S. 327, 328 (1967). The Court takes that step only in the "exceptional case" in which the Court's involvement "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the case." *American Construc. Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893); *accord, Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree," and the absence of a final judgment may "of itself alone furnish[ ] sufficient ground for the denial of the application").

This Court's recent decision in *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam) illustrates this principle. That case arose from an interlocutory court of appeals decision that had rendered unenforceable a Montana statute allowing only licensed physicians to perform abortions. The Court noted that it is "ordinarily reluctant" to review an interlocutory decision, *id.* at 975, but it concluded that the case presented exceptional circumstances warranting review because "the Court of Appeals decision is clearly erroneous under our precedents," "the lower court's judgment has produced immediate consequences for Montana," and it "has created a real threat of such consequences for the six other States in the Ninth Circuit that have physician-only requirements." *Id.*

This case does not meet the demanding standard for review of interlocutory rulings. First, the Seventh Circuit's decision produces *no* immediate consequences for Mr. Ter Maat, other than the prospect of limited further litigation. Moreover, the further proceedings on remand ordered by the Seventh Circuit will either sharpen the circumstances in which a corporate officer's conduct may

render him a CERCLA "operator", or those proceedings may moot that issue entirely, if the District Court absolves Mr. Ter Maat of liability under the "active participation" test. Either way, even if the Petition were otherwise cert.-worthy, this Court should not hasten to resolve what is, at present, a hypothetical issue, but should await a fully developed factual record properly presenting the question in a concrete setting.

5. Finally, Petitioner presents no authority for the various alternative standards of corporate officer liability he advocates. While Petitioner faults the Seventh Circuit for referring to Mr. Ter Maat's role in designing or constructing the landfill, arguing that basing "operator" liability on such activities would punish him for "seek[ing] *compliance* with the law," Pet. 16 (emphasis original), *Bestfoods* recognized just this possibility, holding that a parent company could be liable if it directed "decisions about compliance with environmental regulations." 524 U.S. at 67; *see also, United States v. Township of Brighton*, 153 F.3d 307, 316 (6th Cir. 1998) (municipality could be liable as an "operator" because "[i]t [ ] took responsibility for ameliorating the unacceptable condition of the dump, before and after scrutiny from the state government").

Second, Petitioner argues that Mr. Ter Maat cannot be personally liable as an "operator", because only his corporation, M.I.G., held a state permit to operate the landfill. Pet. i (first formulation of Question Presented), 17. But in a decision Petitioner does not challenge, another of his corporations, AAA, was *also* held liable as an "operator" of the site, even though it too was not permitted under state law. Pet. App. 28a-29a. Moreover, *Bestfoods* itself holds that a person's formal legal relationship to the

facility is irrelevant to CERCLA "operator" liability: "*[A]ny person* who operates a polluting facility" may be liable as an "operator", "whether that person is the facility's owner, the owner's parent corporation or business partner, or even a saboteur who sneaks into the facility at night * * * ." 524 U.S. at 65 (emphasis added). In any event, Petitioner presents no authority, in the statute or elsewhere, for his claim that only the holder of a state-issued permit can be a CERCLA "operator". The identity of the state permit-holder is simply irrelevant to "operator" liability under CERCLA.

Finally, Petitioner argues that certain decisions "seem[ ] to advance" or "impl[y]" a standard under which a corporate officer is only liable if his conduct was somehow wrongful or reckless. Pet. 12, 14; *see also, id.* at 18 (arguing that a corporate officer is only liable if he "has committed a knowing violation of the law or otherwise acted in an environmentally reckless manner"). But these cases' references to "active participation in the wrongful conduct" must be read to mean participation in *the conduct giving rise to liability* – namely, "operation" of a "facility". *Cf. Bestfoods*, 524 U.S. at 64 (quoting similar formulation of the "active participation" standard). In any event, adopting a fault-based standard finds no support in the statute, and is inconsistent with the many decisions holding that CERCLA is a strict liability statute. *See, e.g., Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69, 74 (1st Cir. 1999); *Canadyne-Ga. Corp. v. NationsBank, N.A. (South)*, 183 F.3d 1269, 1275 (11th Cir. 1999); *Public Serv. Co. of Colo. v. Gates Rubber Co.*, 175 F.3d 1177, 1181 (10th Cir. 1999). Petitioner cites no authority which would justify

this Court in creating a fault-based liability standard, solely for corporate officers, from whole cloth.[5]

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[5] Tellingly, although he suggests multiple variants of a non-statutory standard for corporate officer liability, Petitioner does not ask this Court to reinstate the District Court's holding that a corporate officer cannot be held individually liable as an "operator" unless piercing the corporate veil under state law is appropriate. *See* Pet. App. 30a. To the extent the District Court justified its restrictions on corporate-officer CERCLA liability by reference to state law, it was simply mistaken: Under Illinois law a corporate officer may be held individually liable based on his active participation in the liability-creating conduct, without reference to veil-piercing. *See, e.g., People ex rel. Burris v. C.J.R. Processing, Inc.*, 269 Ill. App.3d 1018, 647 N.E.2d 1035, 1038 (3d Dist. 1995) (following federal CERCLA decisions; "corporate officers may be held liable for their personal involvement or active participation in a violation of the [Illinois Environmental Protection] Act"); *Washington Courte Condo. Ass'n v. Washington-Golf Corp.*, 267 Ill. App.3d 790, 643 N.E.2d 199, 217 (1st Dist. 1994); *Mannion v. Stallings & Co.*, 204 Ill. App.3d 179, 561 N.E.2d 1134, 1141 (1st Dist. 1990).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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